Supreme Court, U.S.
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No. 94-623

IN THE
Supreme Court of the United States

OCTOBER TERM, 1994

VIMAR SEGUROS Y REASEGUROS, S.A.,
Petitioner,

v.

M/V SKY REEFER, HER ENGINES, ETC.,
AND M.H. MARITIMA, S.A.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a foreign arbitration clause in a maritime bill of lading is invalid under Section 3(8) of the Carriage of Goods by Sea Act, 46 U.S.C. § 1303(8), or whether such a clause is enforceable under the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

This brief in opposition is filed on behalf of M.H. Maritima, S.A., which is a subsidiary of Honma Senpaku Co., Ltd.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The Respondent, M.H. Maritima, S.A., respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the interlocutory judgment and opinion of the United States Court of Appeals for the First Circuit. That opinion is reported at 29 F.3d 727 (1st Cir. 1994).

REASONS FOR DENYING THE PETITION

Vimar Seguros y Reaseguros, S.A. ("Vimar") asks this Court to review an opinion of the United States Court of Appeals for the First Circuit which is undeniably interlocutory. It would be premature for the Court to consider this case before a final adjudication because the question presented could easily become moot as the action progresses. Should Vimar contest the validity of the arbitration clause on appeal from a final judgment, the parties and Court may better analyze and review that clause when the record includes the procedure for the arbitration, the outcome of the arbitration, and the result of any subsequent litigation.

Moreover, the mere existence of a conflict in decisions between the First Circuit in this case and the Eleventh Circuit in *State Establishment for Agricultural Product Trading* v. *M/V Wesermunde*, 838 F.2d 1576, *cert. denied*, 488 U.S. 916 (1988), does not warrant immediate review. Principles of judicial restraint and the traditional practice of this Court suggest that withholding review and intervention until lower courts have the opportunity to resolve their differences is the more prudent and efficient course.

Finally, a grant of certiorari is unnecessary because the opinion of the First Circuit is correct. In the face of a statutory

conflict, the First Circuit correctly determined that Section 2 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2, requires the enforcement of foreign arbitration clauses in maritime bills of lading notwithstanding Section 3(8) of the Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. § 1303(8).

I. Granting the Petition for a Writ of Certiorari Prior to a Final Adjudication Would be Premature.

This case arrived in the United States Court of Appeals for the First Circuit by certification from the United States District Court for the District of Massachusetts under the Interlocutory Appeals Act, 28 U.S.C. § 1292(b). Certification provided the only available route for review because, under the FAA, a decision staying court action pending arbitration is an interlocutory order which cannot be appealed absent certification. 9 U.S.C. § 16(b). This case remains at an interlocutory stage. After the arbitration in Japan concludes, Vimar may no longer wish to challenge the validity of the foreign arbitration clause. Therefore, granting certiorari before a final judgment issues would be premature.

A denial of certiorari now "[does] not establish the law of the case or amount to *res judicata* on the points raised." *Hughes Tool Co.* v. *Trans World Airlines*, 409 U.S. 363, 365 n.1 (1973) (writ of certiorari as to default judgment dismissed as improvidently granted and case remanded for ruling on damages; after final judgment and appeal, certiorari granted and default judgment reversed based on immunity defense). Therefore, dismissing this petition will neither deprive Vimar of any rights nor prejudice its ability to raise the current issue again.[1]

[1] The Court has in the past denied certiorari on interlocutory issues far more basic than the enforceability of a foreign arbitration clause. In *Indianapolis* v. *Chase National Bank*, 314 U.S. 63 (1941), the Court refused to grant certiorari on an interlocutory order to review whether diversity jurisdiction was proper. After a final decision had been rendered and appealed, the Court reviewed the issue of jurisdiction and found that the federal court had in fact lacked jurisdiction because diversity was incomplete once the parties were realigned according to their true interests.

Moreover, refusing to review this case now will save the Court time and effort in the event that the issue becomes moot after further proceedings at arbitration and in the lower courts, thereby serving "the important purpose of promoting efficient judicial administration." *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 374 (1981) (orders denying motions to disqualify counsel are not appealable final decisions under 28 U.S.C. § 1291). A refusal to review at this time would furthermore be in accord with the "strong congressional policy against piecemeal reviews, and against obstructing or impeding an ongoing judicial proceeding by interlocutory appeals." *United States* v. *Nixon*, 418 U.S. 683, 690 (1974) (district court's order requiring President to comply with subpoena *duces tecum* properly appealable as final order). That congressional policy is affirmed in the FAA, which denies interlocutory review of an order staying litigation pending arbitration, in the absence of district court certification. 9 U.S.C. § 16(b).

At this time, only two circuit courts, the First and the Eleventh, are in conflict. No other circuit courts have ruled on the issue.[2] It is not necessary for the Court to grant certiorari in every instance where the lower courts differ.[3] Justice Brennan

[2] In its petition at page 14, footnote 12, Petitioner cites to several district court opinions addressing the enforceability of foreign arbitration clauses. Far more of these cases enforce such clauses than invalidate them, suggesting widespread support for the First Circuit's opinion.

[3] Indeed, the Court does not invariably grant certiorari every time there is a conflict in the appeals courts. *See, e.g.*, Justice White's dissent from denial of certiorari in *Kamberos* v. *G.T.E. Automatic Electric, Inc.*, 454 U.S. 1060 (1981), objecting to the denial of review of a Seventh Circuit opinion interpreting Title VII which conflicted directly with a decision of the Fifth Circuit, and indirectly with a decision of the Ninth Circuit. *See also* Robert L. Stern, *Denial of Certiorari Despite a Conflict*, 66 Harv. L. Rev. 465 (1953), citing numerous cases wherein certiorari was denied although the appeals courts were in conflict.

has written of the Court's "policy of letting tolerable conflicts go unaddressed until more than two courts of appeals have considered a question." William J. Brennan, Jr., *Some Thoughts on the Supreme Court's Workload*, 66 Judicature 230 (1983). Justice Stevens has pointed out that

> experience with conflicting interpretations of federal rules may help to illuminate an issue before it is finally resolved and thus may play a constructive role in the lawmaking process. The doctrine of judicial restraint teaches us that patience in the judicial resolution of conflicts may sometimes produce the most desirable result.

John Paul Stevens, *Some Thoughts on Judicial Restraint*, 66 Judicature 177 (1982).

In keeping with these policies and principles, the Court should deny the petition for certiorari in respect of this interlocutory order until the proceedings have finally concluded and until other courts of appeals have the opportunity to address the issue.

II. Certiorari is Unnecessary Because the First Circuit Correctly Determined that the FAA Requires Enforcement of a Foreign Arbitration Clause in a Maritime Bill of Lading.

The First Circuit properly determined that the relevant provisions of the FAA and COGSA appear to be in conflict but that the clear language of the FAA mandates enforcement of arbitration clauses such as the one at issue. *Vimar Seguros y Reaseguros, S.A.* v. *M/V Sky Reefer*, 29 F.3d 727 (1st Cir.

1994).[4] The First Circuit relied on well-established canons of statutory interpretation to resolve the conflict. 29 F.3d at 732.

The court applied two basic rules of statutory construction: first, that "a later enacted statute generally limits the scope of an earlier statute if the two laws conflict," 29 F.3d at 732, and second, that "where two statutes conflict, regardless of the priority of enactment, the specific statute ordinarily controls the general." *Id.* Both rules lead to the inescapable conclusion that the FAA controls with respect to arbitration clauses because the FAA is both a more recently enacted and a more specific statute. *Id.*

Policy concerns and the realities of the modern business world support the First Circuit's conclusion. International trade requires respect for international trading partners. "The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts." *The Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972) (enforcing foreign arbitration clause in maritime contract not governed by COGSA). Furthermore, Congress has expressed through the FAA a strong federal policy favoring arbitration as a method of resolving disputes. *Vimar Seguros y Reaseguros, S.A.* v. *M/V Sky Reefer*, 29 F.3d 727, 730-31 (1st Cir. 1994), citing *Shearson/American Express, Inc.* v. *McMahon*, 482 U.S. 220, 226 (1987) (RICO and securities claims subject to arbitration). Together, these important concerns favor enforcement of the arbitration clause at issue.

The First Circuit's opinion here provides a thorough and reasoned treatment of all the issues. No appeals court has followed the Eleventh Circuit, although *Wesermunde* was de-

[4] For the purpose of this proceeding, the court assumed, as Petitioner argues, that COGSA invalidates such clauses because of the possibility that they might lessen a carrier's liability for damage to goods transported. 29 F.3d at 730.

cided six years ago.[5] If the Supreme Court stays its hand, other courts of appeals may elect to follow the First Circuit over the Eleventh, thereby smoothing out the wrinkles in the judicial fabric. Certiorari is unnecessary because the difference of opinion between the First and Eleventh Circuits does not approach the level of an intolerable conflict and because the First Circuit's order requiring that the arbitration clause be observed is correct.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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[5] The Eleventh Circuit's decision in *Wesermunde* is devoid of any significant analysis.